

**ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF: )

Encore Tuscaloosa, LLC )

Tuscaloosa, Tuscaloosa County, AL )

Demolition – McFarland Mall )

900 Skyland Boulevard )

Tuscaloosa, Tuscaloosa County, Alabama )

\*\*\*\*Proposed\*\*\*\*

ADMINISTRATIVE

ORDER NO: 16-\_\_\_\_-AP

**FINDINGS**

Pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22- 22A-16 (2006 Rplc. Vol.), the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23 (2006 Rplc. Vol.), the Alabama Department of Environmental Management (hereinafter, the “Department” or “ADEM”) Administrative Code of Regulations (hereinafter, “ADEM Admin. Code R.”) promulgated pursuant thereto, and the federal Clean Air Act, 42 U.S.C. 7401 to 7671q, as amended, the Department makes the following FINDINGS:

1. Encore Tuscaloosa, LLC (hereinafter, “Encore”) is the owner of McFarland Mall (hereinafter, the “Mall”), located at 900 Skyland Boulevard, Tuscaloosa, Tuscaloosa County, Alabama. Blakeney Company, Inc. (hereinafter, “Blakeney”) was contracted by Encore to demolish the Mall.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401

to 7671q, as amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23 (2006 Rplc. Vol.).

4. The U.S. Environmental Protection Agency's National Emission Standard for Hazardous Air Pollutants (NESHAP), found at 40 C.F.R. Part 61, Subpart M, is incorporated by reference in ADEM Admin. Code r. 335-3-11-.02(12).

5. 40 C.F.R. § 61.141 defines regulated asbestos-containing material as Friable, Category I nonfriable, and Category II nonfriable.

6. 40 C.F.R. § 61.145(b)(3)(i) requires the owner or operator of a demolition or renovation activity for a subject facility to provide written Notice of Intention to Demolish or Renovate (hereinafter, "Notice of Demolition") at least ten workdays before demolition, asbestos stripping or removal work, or any other activity which disturbs the asbestos, begins.

7. 40 C.F.R. § 61.145(a) requires that the owner or operator of a demolition or renovation activity thoroughly inspect the affected facility for the presence of asbestos prior to the commencement of the demolition or renovation.

8. 40 C.F.R. § 61.145(c)(1) requires the removal of all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

9. ADEM Admin. Code r. 335-3-11-.05(1) requires that any person, firm, organization, or corporation who is the owner or operator of any asbestos removal project for which notification is required pursuant to the requirements of rule 335-3-11-.02(12) shall ensure that the parties executing the asbestos removal project are certified by the Department.

10. In May of 2016, the Department discovered that demolition activities had previously occurred at the Mall, and future demolition was planned.

11. The Department has not received and does not have a record of a Notice of Demolition and/or Asbestos Removal from Encore for demolition of the Mall, in violation of ADEM Admin. Code r. 335-3-11-.02(12).

12. Encore failed to submit the required asbestos inspection and conduct abatement prior to demolition, in violation of ADEM Admin. Code r. 335-3-11-.02(12).

13. ADEM Admin. Code r. 335-3-1-.04(1) authorizes the Department to request compliance information from sources of air pollution.

14. On May 27, 2016, the Department sent a Letter of Inquiry to Encore requesting compliance information and a response was due to be received by the Department on or before June 30, 2016.

15. On June 14, 2016, the Department received the response from Encore stating that Blakeney was contracted by Encore to perform the demolition of the Mall.

16. Blakeney is not currently certified and was not certified during the time of demolition by the Department as an Asbestos Removal Contractor. Removal or disturbance of RACM performed by a contractor not certified by the Department is a violation of ADEM Admin. Code r. 335-3-11-.05(1).

17. Pursuant to Ala. Code § 22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the

Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: Encore did not submit the required Notification of Demolition and/or Asbestos Removal or abate the structure of asbestos-containing materials before demolishing the Mall, which could have exposed workers and others nearby to elevated levels of asbestos fibers. Encore failed to conduct the required asbestos inspection prior to demolition. Encore failed to utilize a contractor certified by the Department to disturb ACM. The Department considers these violations to be serious.

B. THE STANDARD OF CARE: There appeared to be no care taken by Encore to comply with the applicable requirements of the ADEM Admin. Code R.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: Encore likely derived economic benefit by not conduct the required asbestos inspection and not properly removing asbestos containing materials before demolishing the Mall.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There were no efforts by Encore to mitigate possible effects of these violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: Encore has no known prior violations of asbestos regulations with the Department.

F. THE ABILITY TO PAY: Encore has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c., *as amended*, as well as the need

for timely and effective enforcement, and has concluded that a civil penalty herein is appropriate (See "Attachment A" which is hereby made a part of these Findings).

**ORDER**

Based upon the foregoing FINDINGS and pursuant to Ala. Code §§22-22A-5(10), 22-22A-5(12), 22-22-5(18), and 22-28-18 (2006 Rplc. Vol.), it is hereby ORDERED:

A. That, not later than forty-five days after the issuance of this Order, Encore shall pay to the Department a civil penalty in the amount of \$10,000.00 for the violations cited herein. Said penalty shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be submitted to:

Office of General Counsel  
Alabama Department of  
Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

B. That, immediately upon receipt of this Order and continuing thereafter, Encore shall ensure immediate and future compliance with 40 C.F.R. Part 61, Subpart M as adopted in ADEM Admin. Code r. 335-3-11-.02, particularly as it applies to renovation and demolition operations.

C. That, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

D. Except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under federal, State or local law, and shall not be construed to waive or relieve Encore of its obligations to comply in the future with any permit or other written direction from the Department.

E. That, issuance of this Administrative Order does not preclude the Department from seeking criminal fines or other appropriate sanctions or relief against Encore for the violations cited herein.

F. That, failure to comply with the provisions of this Administrative Order shall constitute cause for commencement of legal action by the Department against Encore for recovery of additional civil penalties, criminal fines, or other appropriate sanctions or relief.

ORDERED and ISSUED this \_\_\_\_ day of \_\_\_\_\_, 2016.

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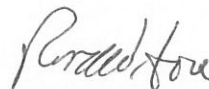
Lance R. LeFleur, Director  
Alabama Department of Environmental  
Management  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2059  
(334) 271-7700

CERTIFICATE OF SERVICE

I, Ronald W. Gore, do hereby certify that I have served this Proposed Administrative Order upon the person(s) listed below by sending the same, postage paid, through the United States Mail **91 7108 2133 3936 7151 0231** with instructions to forward and return receipt, to:

Encore Tuscaloosa, LLC  
Att.: Mr. Stan Pate  
Post Office Box 20828  
Tuscaloosa, Alabama 35402

DONE this the 16<sup>th</sup> day of August, 2016.



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Ronald W. Gore  
Chief - Air Division  
Alabama Department of  
Environmental Management



## ATTACHMENT A

### Encore Tuscaloosa, LLC Tuscaloosa, Tuscaloosa County, Alabama

#### Demolition – 900 Skyland Boulevard, Tuscaloosa, Alabama

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Failure to notify of demolition	1	\$2,000	\$1,000	\$0	
Failure to abate structure	1	\$2,000	\$1,000	\$0	
					<b>Total of Three Factors</b>
<b>TOTAL PER FACTOR</b>		<b>\$4,000</b>	<b>\$2,000</b>	<b>\$0</b>	<b>\$6,000</b>

<b>Adjustments to Amount of Initial Penalty</b>	
Mitigating Factors (-)	
Ability to Pay (-)	
Other Factors (+/-)	
<b>Total Adjustments (+/-) Enter at Right</b>	<b>\$0</b>

<b>Economic Benefit (+)</b>	<b>\$4,000</b>
<b>Amount of Initial Penalty</b>	<b>\$10,000</b>
<b>Total Adjustments (+/-)</b>	<b>\$0</b>
<b>FINAL PENALTY</b>	<b>\$10,000.00</b>

#### Footnotes

\* See the "Department's Findings" portion of the Order for a detailed description of each violation and the penalty factors.